PAROCHIAL SCHOOL AID: A PUBLIC PERSPECTIVE

I. INTRODUCTION

It is the thesis of this note that any form of public aid that may be determinative of the continued operations of parochial education at the elementary and secondary levels will be held invalid by the United States Supreme Court on the ground that such aid would result in sponsorship and active involvement of the state in the activities of church-related schools. The frame of reference to be adopted in determining the constitutionality of the various programs proposed by the states is that of the public perspective, "the one most appropriate for judging governmental action."[1] Aid that runs the risk of *identifying* the state with a school whose very nature is religious will be held to offend the first amendment. In developing this thesis, the note will survey the perspective taken by both the legislatures and the Court in the area of aid to parochial education, tracing the development of standards from *Everson v. Board of Education*[2] to *Walz v. Tax Commission*.[3] Next, the more recent opinions of *Lemon v. Kurtzman*[4] and *Tilton v. Richardson*[5] will be discussed to demonstrate the Supreme Court's new perception of the nature of parochial schools as vehicles of religious indoctrination and to point out the restrictive nature of the Establishment Clause standard. The note will then focus on the confused and uncertain application of the *Lemon* standard by lower courts in challenges to Ohio's parental grant, tax credit, and auxiliary services programs. *Committee for Public Education and Religious Liberty v. Nyquist*[6] will be discussed to illustrate the recent refinement of the Court's perspective and the resultant position that any substantial aid which risks identifying the state with the basic educational process of the parochial school will be held to be invalid. Finally, the refined standard will be applied to the current challenge to Ohio's auxiliary services and materials program and the supplementary appropriations thereto. The note concludes that public aid, if it is truly auxiliary to the purposes of parochial education, will not result in public identification of the state with the religious purposes of parochial schools and should, therefore, meet the requirements of the Establishment Clause test.

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[1] Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 534 (1968).

[2] 330 U.S. 1 (1947).

[3] 397 U.S. 664 (1970).

[4] 403 U.S. 602 (1971).

[5] 403 U.S. 672 (1971).

[6] 413 U.S. 756 (1973).

II. The Development of Standards

A. *The Theoretical Perspective*

The Establishment Clause[7] is based upon the proposition that any union of government and religion "tends to destroy government and to degrade religion."[8] In the classic sense, a state establishment of religion involves the creation of a single, state-supported church. However, the present constitutional standard prohibits even those acts of government which, while not actually establishing religion, merely *tend* towards that result. "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[9] This stricter constitutional prohibition is intended to provide protection against "sponsorship, financial support, and active involvement of the sovereign in religious activity."[10]

However, while the Constitution prohibits governmental establishment of religion, it also guarantees to its citizens the right of free exercise of religion. Hence, there arises within the first amendment an inherent tension,[11] which has been recognized by the Supreme Court:

> [A state] cannot consistently with the . . . First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that [a state] cannot hamper its citizens in the free exercise of their own religion.[12]

The separation between church and state is not complete:

> It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court . . . . As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of 'entangling' precedents.[13]

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[7] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The Religion Clauses were recognized as binding upon the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

[8] Engel v. Vitale, 370 U.S. 421, 431 (1962).

[9] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis in the original).

[10] Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970).

[11] Several theories have been advanced as attempts to resolve this dilemma. *See generally* P. KURLAND, RELIGION AND THE LAW (1962); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

[12] Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

[13] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973).

As a general principle to be followed by government when acting in areas involving religion, the Supreme Court has required that all such action be taken in an attitude of neutrality, *i.e.*, one neither advancing nor prohibiting religion.[14] In practice, however, this requirement of neutrality has not consistently afforded a workable guideline to state legislatures. "[T]he fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause."[15] One such area has been that of public aid to parochial school education.

B. *The Legislative Perspective*

Because a substantial percentage of nonpublic schools are conducted under the auspices of churches,[16] many legislatures have come to regard the Establishment Clause as an obstacle to state attempts to render aid to these church-related schools.[17] By the end of the 1960's, the increasing costs of education coupled with a marked decline in the number of religious faculty available to serve at reduced salaries[18] appeared to threaten the very existence of the church-related parochial schools.[19] What at first was only a parochial school problem very quickly became a problem both for the states and for the local school districts. The parochial school system had, after all, long been valued as a source of diversity

[14] Torasco v. Watkins, 367 U.S. 488 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953); Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947).

[15] Abington School Dist. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting).

[16] Approximately ninety-eight per cent of Ohio's nonpublic school enrollment attends denominational schools. Wolman v. Essex, 342 F. Supp. 399, 403 (S.D. Ohio 1972).

[17] However, private, non-sectarian schools have also felt the effect of the Establishment Clause since legislation authorizing state aid to nonpublic schools usually contains no severability clause as to those institutions. "Therefore the maxim of *de minimis non curat lex* . . . is applicable. Ohio's private, non-sectarian school students have no rights under a statute which is unconstitutional as applied to ninety-eight per cent of its affected class." Wolman v. Essex, 342 F. Supp. 399, 420 n.27 (S.D. Ohio 1972).

[18] Since teachers' salaries represent about seventy per cent of a typical public school budget, religious personnel subsidize the cost of religious education. J. Dillehay, L. Fruch, R. Stevens, J. Treacy, An Analysis by Ohio County of the Financial Effects of the 1972 State Foundation Program (H.B. 475) Assuming Non-Shifting and Shifting of Non-Public Pupils, FEG Report No. PS101, at 10 (Wright State University, Dayton, Ohio 45431) [hereinafter cited as Ohio County Analysis]. Currently, sixty-one per cent of school costs in parochial elementary and high schools are spent in instructional salaries. In private schools, where religious communities provide more of the staff, salaries account for some fifty-three per cent of the total cost. National Catholic Educational Association, U.S. Catholic Schools: 1972-73, at 16.

[19] "Nonpublic school enrollment has dropped at the rate of six per cent per year for the past five years. . . . Projected to 1980, it is estimated that seven States [included within those seven is Ohio] will lose 1,416,122 nonpublic school students." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 817 (1973) (White, J., dissenting).

in a pluralistic society.[20] State legislatures, confronted with rising costs of their own[21] and with an influx of students unable to pay the increased parochial school tuition, sought to provide relief to church-related schools[22] in an attempt to ease the burden on the public system.

C. *The Judicial Perspective: Everson to Walz*

Until the recent period of financial crisis, the Supreme Court attempted to achieve governmental neutrality towards religion by requiring that legislation have both a secular purpose and a primary effect not advancing religion. This standard permitted a few instances of state aid in areas more or less incidental to the educational process of nonpublic schools. *Everson v. Board of Education*[23] upheld a New Jersey statute[24] providing reimbursement, to parents of public and nonpublic school children alike, of money expended for transportation to and from school. In holding that the first amendment presented no obstacle to state expenditures of tax-raised funds as a part of a general program of public welfare benefits, the Court noted that the indirect benefit realized by the parochial schools[25] was the same as that already realized through the admittedly permissible provision by the state of other public services. The opinion emphasized the position of neutrality properly to be taken by government in pointing out that although equality of treatment is not required, state power is no more to be used to handicap religions than it is to favor them.[26]

However, Mr. Justice Douglas, one of the majority in *Everson*, later expressed grave doubts about the decision: "Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial

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[20] *Id.* at 773.

[21] From 1958 to 1971, public school expenditures throughout the United States have tripled to $43 billion, due primarily to an increase in total school population and to the rapid increase in salaries and fringe benefits. These forces, however, have begun in recent years to abate. Ohio County Analysis, *supra* note 18, at 15.

[22] It has been estimated, for example, that a total shift of Ohio's nonpublic pupils to the state's public schools would generate additional costs of $295 million, the state bearing under its current programs $177 million and the local school districts the remaining $118 million. *Id.* at 14.

[23] 330 U.S. 1 (1947).

[24] 18A N.J. STAT. ANN. § 39-1 (Supp. 1973).

[25] "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." Everson v. Board of Educ., 330 U.S. 1, 17 (1947).

[26] *Id.* at 18.

schools—lunches, books, and tuition being obvious examples."[27] His fears were at least partially confirmed in *Board of Education v. Allen*,[28] which upheld a New York statute authorizing the free loan of textbooks to children of both public and nonpublic schools.[29] The Court in *Allen* applied the two-part standard expressed in *Abington School District v. Schempp*[30] as a means of achieving governmental neutrality towards religion: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[31] The Court has since defined "primary effect" to mean the "direct and immediate effect of advancing religion" and not necessarily of first importance.[32] The Court had long before rejected the "simplistic" notion of absolute prohibition of aid to religious concerns,[33] and had recognized the secular relevance of religious interests.[34] Therefore, after *Allen*, it could be strongly argued that state aid which used secular means to achieve secular results without a substantial religious impact upon sectarian school students was constitutional.

The Court in *Everson* declined to "strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power."[35] The New York statute upheld in *Allen* reached that verge, and the Court later sought a means of assuring that future state action did not topple over. It found that means in *Walz*

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[27] Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

[28] 392 U.S. 236 (1968).

[29] N.Y. EDUC. LAW § 701 (McKinney Supp. 1967). The state had already construed this statute as authorizing the loan of only secular textbooks. Board of Educ. v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791 (1967). The United States Supreme Court had previously held that the furnishing of secular textbooks to private school students was not violative of due process under the fourteenth amendment as a use of tax funds for a private purpose. Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). The Establishment Clause was not involved in this decision since it had not yet been held that the clause was binding upon the states through the fourteenth amendment.

[30] 374 U.S. 203 (1963).

[31] *Id.* at 222.

[32] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 784 n.39 (1973). *See also* Mr. Justice White's dissent at 823. Tilton v. Richardson, 403 U.S. 672 (1971), held unconstitutional one provision of the Higher Educational Facilities Act of 1963. 20 U.S.C. §§ 701-721 (1965-69 Supp. V). The invalidated provision prohibited the sectarian use of federally financed facilities for a period of twenty years. 20 U.S.C. § 751 (a)(C), (D) (1965-69 Supp. V). The Court found that section to have the effect of advancing religion after twenty years, despite the congressional determination that, after that time, the federal government would have obtained a secular benefit equal to or exceeding any religious value obtained through the grant. 20 U.S.C. § 754 (1965-69 Supp. V). Thus the Court made clear that the unconstitutional primary effect need not be foremost.

[33] Bradfield v. Roberts, 175 U.S. 291 (1899).

[34] McGowan v. Maryland, 366 U.S. 420 (1961).

[35] Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

v. Tax Commission,[36] where the majority tentatively announced and explored the concept of excessive entanglement and political strife which Mr. Justice Douglas first mentioned in his dissent to *Allen*.[37]

In *Walz*, the Court held that an exemption from property tax[38] granted to church property used for worship was not violative of the Establishment Clause. The Court stated that the position of "benevolent neutrality" properly to be adopted by government in order to avoid sponsorship of or interference with religion allowed "room for play in the joints."[39] The exemption was found to be predominantly neutral in its design to foster not solely churches but also an entire class of institutions whose functions are beneficial to the general community. Emphasis was also placed upon the fact that the exemption was nearly two centuries old and that it had not to that point resulted in an establishment of a state religion. In considering the effect of declaring the exemption unconstitutional, the Court perceived a danger of excessive entanglement with religion if the government should have to foreclose on church property. Thus the holding in *Walz* may be seen as illustrative of the inherent tension within the Religion Clauses and the consequent conflicting values confronting the state—and the Court. The decision is in part an effort to minimize any entanglement of church and state and in part an effort to avoid reversing nearly two hundred years of history, for such a reversal could only be characterized as a newly-developed hostility towards religion.

III. *Lemon* AND *Tilton*: THE NEW PERSPECTIVE

In *Lemon v. Kurtzman*,[40] the Supreme Court, fearing that what is today "a trickling stream may all too soon become a raging torrent,"[41] formally incorporated the excessive entanglement concept into the Establishment Clause test.[42] *Lemon* involved challenges[43] to Rhode Island

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[36] 397 U.S. 664 (1970).

[37] 392 U.S. at 265 (footnote omitted):

> The initiative to select and requisition "the books desired" is with the parochial school. Powerful religious-political pressures will therefore be on the state agencies to provide the books that are desired.
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> These then are the battlegrounds where control of text book distribution will be won or lost. Now that "secular" textbooks will pour into religious schools, we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church.

[38] N.Y. CONST. art. XVI, § 1.

[39] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

[40] 403 U.S. 602 (1971).

[41] Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

[42] It is interesting to note, however, that while the concept of entanglement in *Walz*

and Pennsylvania statutes which provided salary supplements to teachers of secular subjects in nonpublic schools. The Rhode Island Salary Supplement Act[44] authorized a supplement not in excess of fifteen per cent of the teacher's current annual salary on the conditions that the teacher use only those materials used in public schools and agree not to teach courses in religion. Payment was to be made directly to the teacher. The Pennsylvania Non-public Elementary and Secondary Education Act authorized the "purchase" by state officials of specified "secular educational services" for nonpublic schools.[45] Reimbursement was to be made directly to the contracting nonpublic schools for expenditures made for salaries, textbooks, and instructional material used only in connection with courses not containing sectarian teaching. A three-judge district court found that the parochial school system in Rhode Island was "an integral part of the religious mission of the Catholic Church."[46] On this basis, the aid was found to be invalid not because it assisted religious teaching, but because it assisted in a variety of ways the maintenance of an *entire educational environment* within which religious instruction took place.

The United States Supreme Court in *Lemon* found the funding provided by both states to be unconstitutional on the ground of excessive entanglement, arising both from the continuing state surveillance necessary to ensure that statutory restrictions are obeyed and from the state inspection of school records necessary to implement the programs. In the majority opinion, Mr. Chief Justice Burger did not define excessive entanglement, but rather set out factors to be considered in determining the validity of legislative action: first, the character and purpose of the institutions benefited; second, the nature of the aid provided; and, third, the resulting relationship between the government and the religious institution.[47] Because the Court relied upon the Rhode Island district court's findings as to the religious nature of the schools involved,[48] it found that

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seemed to be an aspect of the concept of neutrality, the Court in *Lemon* made no mention of neutrality.

[43] Di Censo v. Robinson, 316 F. Supp. 112 (D.R.I. 1970); Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969).

[44] R.I. GEN. LAWS ANN. §§ 16-51-1 through 16-51-9 (Supp. 1970).

[45] 24 PA. STATS. ANN. §§ 5601-09 (Purdon Supp. 1973).

[46] Di Censo v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970). In Lemon v. Kurtzman, 310 F. Supp. 35 (E.D.Pa. 1969), a three-judge district court granted the state's motion to dismiss the complaint for failure to state a claim, finding no violation of the first amendment.

[47] 403 U.S. at 615.

[48] Although the complaint in *Lemon* contained certain allegations as to the nature of the Pennsylvania parochial schools involved, there were no findings made as to their nature since the complaint was dismissed. The Court adopted a "cavalier" approach, however,

teacher salary subsidies, as a general proposition, substantially risked a fostering of religion since "[r]eligious authority necessarily pervades the school system" and a "conflict of functions inheres in the situation."[49] Both statutes required certain administrative procedures designed to exclude religion in those areas subsidized by the states. However, it was precisely these attempts to guarantee secular use that would run a risk of impermissible embroilment because "the cumulative impact of the entire relationship . . . involves excessive entanglement . . . ."[50] In other words, aid which resulted in an intimate relationship between the state and the school created a risk that the public would identify the two as one entity and thus was impermissible.

The Court spoke for the first time of the danger of the divisive political potential inherent in the provision of state aid to parochial schools. Advancing the "progression argument" of demands for increased aid not found to be present in the facts of *Walz*,[51] the majority saw a danger of political fragmentation and controversy along religious lines:

> Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose.[52]

However, while pointing out the danger of divisiveness, the Court went to great lengths to avoid condemnation of religious groups taking strong positions on public issues. As a result, the concept of political divisiveness does not easily lend itself to analytical reasoning. While approving political controversy along potentially religious lines in other contexts,[53]

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in taking judicial notice of the fact that the Pennsylvania parochial schools were conducted on the same basis as the trial court in *Di Censo* found the Rhode Island schools to be conducted. Giannella, *Lemon and Tilton: The Bitter and The Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 167 (1971).

[49] 403 U.S. at 617.

[50] *Id.* at 614.

[51] *Id.* at 624.

[52] *Id.* at 622.

[53] Inasmuch as religion is an element of society and of its culture, it can be expected to be a factor in the political process. An element of religion was present, for example, in the recent debates over the validity of anti-abortion statutes, and may, perhaps, be present in opinion regarding the posture to be taken by the United States toward Israel. The same political divisiveness argument could very easily have been made with respect to providing reimbursement for bus transportation and particularly to the loan of secular textbooks to nonpublic school children in *Everson* and in *Allen*. The fact that the statutes in those cases benefited both public and nonpublic school children, however, may weaken that argument.

the Court provided no means of distinguishing healthy from unhealthy political-religious activity.[54] Yet the concept can be seen as a natural consequence of public identification of the state and the church-related school.

The opinions in *Tilton v. Richardson*[55] make clear that the Court based its entanglement decision in *Lemon* upon a generalized notion of the differences in educational purposes between church-related institutions at the lower levels and those at the higher levels. In upholding certain provisions of the Higher Educational Facilities Act of 1963[56] authorizing federal grants and loans to colleges and universities for the construction of a wide variety of facilities, the Court noted that religious indoctrination was not generally perceived to be a substantial purpose of the colleges involved in the case. Further, institutions at the higher levels generally foster an atmosphere of academic freedom where persons of all beliefs are admitted to both the faculty and the student body. The plurality in *Tilton* found little likelihood of religious permeation in secular activities; therefore, there was little need for excessive entangling governmental surveillance to ensure secular use. The Chief Justice did comment that if a case were to appear before the Court involving a college whose religious and secular functions were found to be inseparable, governmental aid to that institution might be set aside.[57] In *Lemon*, however, the Court made no such provision for exceptions to be made with regard to any particular elementary or secondary parochial school not conducted in the manner in which the trial court found that the Rhode Island parochial schools were conducted.[58] In addition, the Court in *Tilton* saw no real danger of political divisiveness in the federal program, since the grants involved no continuing financial relationship or annual re-evaluation of appropriations.

Viewing *Lemon* and *Tilton* in retrospect, it may be said that entanglement, both administrative and political, appears to reach unacceptable

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[54] "[P]olitical debate and division, however vigorous and even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." 403 U.S. at 622.

[55] 403 U.S. 672 (1971).

[56] 20 U.S.C. §§ 701-721 (1970).

[57] 403 U.S. at 682.

[58] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 824 (1973) (White, J., dissenting).

> At the very least I would not strike down these statutes on their face. The Court's opinion emphasizes a particular kind of parochial school, one restricted to students of particular religious beliefs and conditioning attendance on religious study. Concededly, there are many parochial schools that do not impose such restrictions. Where they do not, it is even more difficult for me to understand why the primary effect of these statutes is to advance religion.

proportions only in the context of aid to elementary and secondary schools. "[The two cases] are grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution."[59] Since the Court found in *Tilton* that religion does not generally permeate church-related institutions of higher learning, it would appear that the entanglement test presents an obstacle only to state aid to elementary and secondary parochial schools.[60]

IV. The Aftermath of *Lemon*: The Ohio Experience

The United States Supreme Court in *Lemon* established a tripartite Establishment Clause test, the contours of which, as of 1971, were hazy. The first prong of the test required that legislative enactments have a secular purpose. Because parochial schools are seen to provide valuable diversity to society and because of the economic effects upon the public school systems presented by declining enrollments in parochial schools, state aid programs are generally the result of legislative attempts to preserve this diversity and the financial integrity of the public schools. Therefore the secular purpose of such legislation is generally recognized.[61]

The second prong of the Establishment Clause test requires that the primary effect of the legislation not be the advancement of religion. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ."[62] The "flow" of such unconstitutional aid may be directly to the schools involved, as that authorized by Pennsylvania's Nonpublic Elementary and Secondary Education Act, or indirectly through the teachers, as that authorized by Rhode Island's Salary Supplement Act. However, *Lemon* and its predecessors failed to establish fully the point at

[59] Hunt v. McNair, 413 U.S. 734, 746 (1973).

[60] A further result of this new dimension to the constitutional prerequisites to valid state aid was that state legislatures were faced with seemingly irreconcilable decisions. One wonders, for example, whether a statute permitting the free loan of textbooks to nonpublic school children, were it to come before the Court today, would satisfy the prohibition against excessive entanglement.

[61] For this reason, the court in Wolman v. Essex, 342 F. Supp. 399, 411 n.13 (S.D.Ohio 1972), *aff'd*, 409 U.S. 808 (1972), expressed its opinion that "the first prong of the *Lemon* test will almost invariably be satisfied . . . and may not truly exist as a distinct, dispositive requirement." In Brusca v. Board of Educ., 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd.*, 405 U.S. 1050 (1972), however, it was held that any attempt to amend Missouri's constitution prohibiting all aid to church-related schools would *per se* violate the Establishment Clause for failure to meet the first prong of the Establishment Clause test. *See also* Reitman v. Mulky, 387 U.S. 369 (1967).

[62] Hunt v. McNair, 413 U.S. 734, 743 (1973).

which state aid is to be characterized as having the *primary* effect of advancing religion. *Everson* recognized the benefit realized by the church-related school even through constitutionally valid state aid. Yet *Tilton* made clear that the effect of advancing religion need not be foremost in order for aid to be held unconstitutional.

The third prong of the Establishment Clause test remained, as of 1971, the most nebulous. *Lemon* presented no workable definition of entanglement nor did it specify the point at which that entanglement became excessive. The Court in *Lemon* looked to the administrative surveillance and to the fiscal auditing required to implement the legislative programs and found that the cumulative impact of the relationship between church and state arising from such interaction offended the Establishment Clause. The risk of fragmentation of the body politic, perceived to be a necessary consequence of such interaction, remained even less clear. Why state subsidized transportation and provision of textbooks was not seen to involve such risk in *Everson* and in *Allen*, but was so perceived in the state subsidies of teacher salaries in *Lemon* is difficult to say.[63] *Lemon*, therefore, left the situation with regard to alternative forms of aid at the lower levels of parochial school education constitutionally unclear.

Against this background in the fall of 1971, the General Assembly of Ohio passed a statute,[64] which, among other things, authorized payment to the various school districts for the purpose of reimbursing eligible parents of nonpublic school children for a portion of the expenses incurred by them in the education of their children.[65] In order to qualify for the grants, parents were required to submit applications containing an assurance that they had actually spent on the nonpublic education of their children an amount equal to the reimbursement sought. No conditions or restrictions were placed upon the use of the funds granted. The amount of the grants for the years 1971-73 was fixed at ninety dollars per year per student. However, another statutory provision[66] specifically authorized periodic redetermination of that amount by the State Board of Education.

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[63] The Court unconvincingly distinguished the teacher salary supplements involved in *Lemon* from the loan of textbooks involved in *Allen*: "We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." Lemon v. Kurtzman, 403 U.S. 602, 617 (1971). A teacher's "substantially different ideological character" is often expressed through the handling of the subject matter presented in textbooks.

[64] OHIO REV. CODE ANN. § 3317.062(D) (Page 1972).

[65] Also instituted was an auxiliary services and materials program, discussed *infra*.

[66] OHIO REV. CODE ANN. § 3317.02(D) (Page 1972).

The Ohio legislature had gone to great lengths to avoid the entanglement problems of *Lemon*. The new legislation specifically precluded any administrative authority over the policy determinations, programs of instruction or any other aspects of the operations of the nonpublic schools involved. Further, the benefits were conferred directly upon the parents of the school children rather than upon the schools themselves. The parental grant program was soon challenged and a unanimous three-judge district court held it to be unconstitutional in *Wolman v. Essex*.[67]

As a preliminary step in its analysis of the legislative scheme, the court in *Wolman* took due, if only formal, notice of the secular purposes of the statute.[68] The court then considered the three factors set out in *Lemon* to determine the validity of this statutory scheme.[69] In determining the character and purpose of the beneficiaries of the program, the court distinguished this program from instances of constitutional aid provided to children of public and nonpublic schools alike. Although the grants were directed to parents rather than to schools, the court found that the limited nature of the class affected and the fact that one religious group so predominated that class made suspect the neutrality of the statute.[70]

> [M]erely because the class to which the statute is directed is small and sectarian is not grounds for holding it unconstitutional *per se* on neutrality doctrine grounds, but such determination may dictate an additional inquiry . . . . A review of the cases seems to indicate that "neutrality" and "entanglement" exist in an inverse relationship to each other: where there is little evidence that a statute has a predominantly neutral purpose and effect, as where the affected class is small or predominantly sectarian, courts have scrutinized the statute to see if it engenders excessive entanglement . . . . Conversely, where the indicia of neutrality are high, as in *Walz*, . . . because the affected class is broad and internally pluralistic, the inquiry into entanglement has been less strict.[71]

The court held that, upon close scrutiny, the distinction between public moneys for general educational purposes directed to schools and the same moneys directed to parents of students in those schools was no distinction at all. The parents were mere conduits of public funds to parochial

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[67] 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd.*, 409 U.S. 808 (1972). For cases dealing with similar programs see Opinion of the Justices, 357 Mass. 846, 259 N.E.2d 564 (1970); Hartness v. Patterson, 255 S.C. 503, 179 S.E.2d 907 (1971); Swart v. South Burlington School Dist., 122 Vt. 177, 167 A.2d 514 (1961), *cert. denied*, 366 U.S. 925 (1961).

[68] 342 F. Supp. at 411 n.13.

[69] 403 U.S. at 615.

[70] 342 F. Supp. at 412.

[71] *Id.* at 413.

schools, and these latter were the true beneficiaries of Ohio's legislative program.[72]

Although the parties, through counsel, supplied the court with stipulations pertaining to the Catholic school system in Ohio,[73] the court apparently placed great weight upon the definition of a Catholic school contained in the Administrative Regulations of the Diocese of Columbus: "The inclusion of religion in the curriculum is the deciding factor in the Church's and the Catholic parents' decision to erect schools where the integrity of all subject matter can be maintained in an atmosphere of Christian thought."[74] Thus the court concluded that nonpublic sectarian schools in Ohio, beneficiaries of the parental grant program, retain a substantial religious character.[75]

Having determined the character and purpose of the institutions benefited, the district court then directed its attention to the nature of the aid provided. Because tuition to a parochial school forms a major portion of the school's general fund, the court found that the lack of restrictions upon its use enabled the schools to use the money for any purpose it deemed legitimate. The funds could, for example, ultimately find their way to the construction of a chapel. The character of the religious schools and the unrestricted nature of the aid provided would result, the court found, in a relationship of continuing state surveillance of the participating schools in order to ensure that the funds would be used for secular purposes. Such administrative surveillance would necessarily involve excessive entanglement with the operation of the educational functions of the school.

The court in *Wolman* misunderstood the tripartite character of the Establishment Clause test enunciated in *Lemon*. It failed to realize that the second prong of the test is to be considered separately from the excessive entanglement question, and may itself be dispositive of the question of constitutionality. The state programs at issue in *Lemon* met the primary effect requirement of the test, for, if properly effectuated, the authorized aid would not, theoretically, advance the religious functions of the parochial schools. Ensurance of the proper effectuation of those statutes, however, would necessarily involve excessive entanglement with the operation of the educational functions of the schools. Thus, while meet-

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[72] *Id.* at 416.

[73] *Id.* at 420-25.

[74] *Id.* at 405. It is interesting to compare this with the attitude adopted by the Supreme Court in *Tilton*: "MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian . . . ." Hunt v. McNair, 413 U.S. 734, 743 (1973).

[75] 342 F. Supp. at 405.

ing the first two prongs of the test, the programs dealt with in *Lemon* failed to meet the third and were therefore found to be unconstitutional.

In trying to conform to *Lemon*, the district court in *Wolman* apparently felt that the primary effect test no longer had constitutional force; at the very least, it regarded the neutral primary effect requirement as only a preliminary stage in evaluating the possible risk of entanglement. The district court could logically have ended its analysis before reaching the issue of entanglement and found that, since parents serve as conduits of public funds to parochial schools, the absence of restrictions upon those funds had a primary effect of advancing the sectarian functions of those schools. Instead, the court, in a convoluted fashion, twisted itself around to reach the entanglement objections.

In its discussions of possible political fragmentation resulting from entanglement, the district court noted that non-entanglement "is not necessarily assured when administrative activity by government is neutral; participation of any sort by government in statutory programs affecting religion would entangle it in the emotional currents that the Establishment Clause is designed to avoid."[76] In this statement, the district court evidenced a willingness to accord to the political divisiveness argument a greater weight than even the United States Supreme Court had given it in *Lemon*. The court in *Wolman* considered that a greater danger of political fragmentation arose from direct subsidies than from tax exemptions, because subsidies must be passed upon periodically and thus invite more political controversy than do exemptions. That danger was fully present in the statutory scheme before the district court because of the specific provision that the amount to be paid was to be periodically determined by state officials.

In *Kosydar v. Wolman*,[77] the same district court found constitutional objection to tax exemptions. In this case, the court held unconstitutional Ohio's tax credit program which reallocated the funds appropriated for the tuition reimbursement program invalidated in *Wolman*. This second scheme allowed a credit to a class of persons including the parents of nonpublic school children for expenses in excess of that spent generally by public school parents. The credit could not exceed their total tax liability under state income, sales, personal property, excise, and real property tax provisions, after other deductions. Where the credit allow-

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[76] *Id.* at 409. This would appear to be somewhat of an overstatement since the Supreme Court has noted that the nation's history has not been one of entire separation of church and state. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973).

[77] 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd sub nom.* Grit v. Wolman, 413 U.S. 901 (1973).

able exceeded the total state income tax liability, the parent would be entitled to a refund payable out of a "tax refund rotary fund."[78] Although the program did not necessarily involve a transfer of state funds to the parents, the court found objection in the fact that the program provided relief solely because the recipients had expended money for non-public school education:

> "It simply defies reason to say that such a statute does not aid sectarian schools. Such aid may be less direct and less capable of precise measurement than a grant to the schools themselves; yet if some parents will now be able to send their children to these schools or if fewer parents already utilizing them will be forced to withdraw their children, they will be aided."[79]

In response to *Wolman*'s objections to the restricted class of beneficiaries, Ohio's General Assembly broadened the class of recipients eligible for relief to include, among others, persons enrolled in home instruction programs, in public adult high school continuation programs, in schools for tubercular persons and basic literacy programs, and in programs for the deaf, blind, crippled and emotionally handicapped.[80] The district court in *Kosydar* was unimpressed with the class of beneficiaries as expanded: "[I]f the legislative goal was to extend partial tax credit to parents who incur additional expenses in securing an education for their children, . . . then this benefit should logically have been extended to the parents of all school children in Ohio."[81] Thus the addition of new beneficiaries, when viewed in relation to the size of the sectarian subclass of beneficiaries, did not alter the sectarian nature of the recipient class taken as a whole.

The court reduced its analysis of the effect of the statute to the breadth of the class of beneficiaries, which was found to be considerably more narrow than the potentially relevant class:

> [W]here the affected class is predominantly religious or sectarian and the benefits provided are not inherently ideologically neutral, as where the state provides monetary grants to parents or institutions belonging to a class that is essentially religious in character, then, as a matter of law, the primary effect of such a statute is to advance religion, and the

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[78] OHIO REV. CODE ANN. §§ 5703.052, 5747.05 and 5747.111 (Page 1973). Although, theoretically, the credit would not involve an affirmative state subsidy, excise, and sales taxes in Ohio form the general revenue funds and are not in practice segregated to the account of the individual taxpayer. Indeed, calculation of the individual's total tax liability would be very nearly impossible.

[79] 353 F. Supp. at 762.

[80] A more complete list of those eligible for aid is set out in 353 F. Supp. at 750.

[81] *Id.* at 760.

> statute must be closely scrutinized for possible entanglement effects, primarily in terms of *political* entanglement.[82]

The court once again misunderstood the tripartite nature of the test established by *Lemon*, in which all three prongs must be separately met. Having found that the tax program failed to meet the primary effect test, the court needlessly proceeded to state that "Its validity can be upheld against constitutional challenge only if the state can demonstrate by clear and convincing evidence, that the political entanglement problems which customarily attach to a law that has such an effect will be avoided."[83] It is interesting to note that, in declaring the program unconstitutional primarily on political entanglement grounds—never solely relied upon by the United States Supreme Court—the district court in *Kosydar* foreclosed to the state its most effective means of refuting the political entanglement objection: history.[84]

In contrast to the application of *Lemon* by the district court was that by the Ohio supreme court in *Protestants and Other Americans United for Separation of Church and State v. Essex*[85] [hereinafter *P.O.A.U. v. Essex*]. The Ohio General Assembly had instituted in 1967 a program providing auxiliary services and materials to students in non-public schools.[86] That program, as effective between December 1, 1967 and August 18, 1969, was upheld by a unanimous Ohio supreme court. Such services and materials, the court found, "do not lend themselves to the religious aura of the recipient sectarian schools . . . [but rather] enhance

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[82] *Id.* at 753 (emphasis in the original).

[83] *Id.* at 762.

[84] In *Walz*, it will be remembered, the Supreme Court took note of the fact that the two centuries of history of tax exemption for church property had not resulted in an establishment of a state religion. In referring to *Walz*, Mr. Justice Rehnquist has remarked: "[I]f long-established use of a particular tax exemption scheme leads to a holding that the scheme is constitutional, that holding should extend equally to newly devised tax benefit plans which are indistinguishable in principle from those long established." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 808 (1973) (Rehnquist, J., dissenting).

[85] 28 Ohio St. 2d 79, 275 N.E.2d 603 (1971).

[86] OHIO REV. CODE ANN. § 3317.062 (Page 1972):

> Moneys paid to school districts . . . shall also be used to provide . . . services and materials to pupils attending nonpublic schools within the school district for: guidance, testing, and counseling programs; programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children; audio-visual aids, speech and hearing services; remedial reading programs; educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils. . . .

The pertinent statute was at that time OHIO REV. CODE ANN. § 3317.06(H) (Page Supp. 1970), since replaced by the present statute.

only the secular educational process and that process is properly the concern of the state."[87]

Ohio's auxiliary services program does not provide funding for the teaching of basic core courses. Nor are the grants made directly to the parochial schools since state funds are paid to the public school districts whose officials then contract for services to be provided directly to the students.[88] The materials provided under the program are lent to the schools, but remain in the ownership of the state and may not be selected for, used in, or especially suitable for use in sectarian religious courses or devotional exercises. Further, the statute permits public school districts to provide to students enrolled in parochial schools only those auxiliary services provided to students of the public schools in their districts.[89]

In dealing with the materials provided under the program, Ohio's supreme court recognized that such provision would necessarily relieve the parochial schools of the enormous cost of supplying such items as audio-visual aids and equipment for speech and hearing and remedial reading programs. However, the court felt that both *Everson* and *Allen* permitted such indirect benefit to parochial schools since such materials possess a negligible religious implication. Citing *Walz* and *Allen*, the court found that Ohio's materials program met the first two prongs of the tripartite test: "[T]he supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment."[90] In testing the provision of materials in the light of the prohibition against excessive administrative entanglement articulated in *Lemon*, the court in *P.O.A.U.*

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[87] 28 Ohio St. 2d at 83, 275 N.E.2d at 605.

[88] OHIO REV. CODE ANN. § 3317.02(D) (Page 1972) provides the general educational appropriations to the various school districts and includes a specified amount based upon the number of pupils attending the nonpublic schools of the districts to be used for the services authorized in OHIO REV. CODE ANN. § 3317.062 (Page 1972).

[89] This program was enacted as a part of the legislative scheme authorizing as well the parental reimbursement grant program invalidated in *Wolman*. Although the auxiliary services and materials program was not challenged in that case, the district court distinguished the two programs on a preliminary basis. While the unconstitutional parental grants placed no restrictions or guidelines upon their use, the services and materials provided were to remain of a secular nature and were to be made available on a non-discriminatory basis, not exceeding in cost or quality similar services provided in the public schools of the district. 342 F. Supp. at 403. The court also accorded peripheral approval of the program in holding that:

> Although Section 3317.062 contains no express severability clause, it is the opinion of this Court that those aspects of the Section not challenged herein; and which were upheld against constitutional challenge by the Ohio Supreme Court in P.O.A.U. v. Essex, *supra*, are of continuing validity. "The cardinal principle of statutory construction is to save and not to destroy." This Court's final order will pay respect to this sound principle of constitutional adjudication.

342 F. Supp. at 419 n.27 (cited authorities omitted).

[90] 28 Ohio St. 2d at 83, 275 N.E.2d at 605.

v. Essex emphasized the concept of excessiveness which forms the crux of the third prong of the Establishment Clause test and found no greater possibility of entanglement than that existing in the schemes of aid permissible under *Everson* and *Allen*: "To be sure, the contacts here are greater than if no aid were extended at all, but we do not find that degree of 'official and continuing surveillance,' or an initial excessive degree of 'involvement,' in this act such as would render it constitutionally objectionable."[91] The state would make an initial inspection to assure the secular nature of the materials provided, as was the procedure in *Allen*. Under the statute, the State Board of Education is empowered to reject applications for any items if doubt exists as to the possibility of their use for religious purposes. The Ohio supreme court distinguished entanglement problems arising through the extensive auditing and data inspection procedures present in *Lemon* from the periodic inspection procedure which would be made in any case to check the physical condition of the materials.[92]

In authorizing auxiliary services to nonpublic school children, Ohio's program provides that all personnel involved be under contract to the state and remain under the control of the local public school district, a fact which the Ohio supreme court found "effectively negates the existence of 'religious control and discipline' as an element of the instant case."[93] There should arise no greater danger of unconscious injection of religious doctrine by a teacher participating in this program than with that of any teacher in a public school. Further, in distinguishing *Lemon*'s invalidation of salary supplements paid to parochial schools for teachers of secular courses, the Ohio supreme court emphasized the auxiliary nature of the services provided:[94] "It is difficult for us to perceive how specialized services, attuned to the needs of the physically, emotionally,

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[91] *Id.* at 85, 275 N.E.2d at 606.

[92] The court failed to take note, however, of the United States Supreme Court's specific approval in *Tilton* of the fact that contact with the colleges involved in that case was limited to a one-time undertaking.

[93] 28 Ohio St. 2d at 87, 275 N.E.2d at 608.

[94] The United States Supreme Court may have indicated disapproval of even auxiliary aid in *Lemon*, however, in finding unconstitutional the Pennsylvania program providing salary supplements to teachers of secular courses. Included as a course appropriate under the program was physical education, a subject not generally regarded as one easily lending itself to religious bias. More importantly, the Court struck down the entire program despite an explicit severability clause included in the statute. 24 PA. STAT. ANN. § 5608 (Purdon Supp. 1973). It may be, however, that the Court regarded the focus of the aid as a program —teachers' salaries—as too intimately involved with the total educational process of the parochial schools and thus not really separable from the regular curriculum and operations of the schools: "Our decisions from *Everson* to *Allen* have permitted the states to provide church-related schools with secular, neutral or non-ideological, services, facilities or materials." Lemon v. Kurtzman, 403 U.S. at 616.

and culturally handicapped children of this state, could give rise to the same fears of religious bias as might exist in an informal, day-to-day teaching situation."[95] This distinction is crucial in determining the primary effect of the legislation. Aid directed not toward the basic educational curriculum of the school but toward the particular problems of particular students may not run the risk of identification of the state with the religious activities or nature of the school. The Supreme Court of the United States has long recognized the secular function of parochial school education, but it held in *Lemon* that state subsidy of the teaching of secular subjects is impermissible, since those subjects may be easily and are often unconsciously transformed into vehicles of religious indoctrination. The Court has never held impermissible state aid in the form of true public welfare to individuals in areas in which the sectarian function of the schools can be omitted. Indeed, *Everson* and *Allen* stand for the contrary. Professor Giannella has suggested that one possible test in determining whether a provided service constitutes a legitimate child benefit might be,

> whether the service is functionally so divisible from the regular curriculum and operations of the school that its cost could be readily allocated to those students utilizing it by means of a special charge. . . . Under this more restricted test, textbook loans and bus rides could be easily justified, and a very good case could be made for the sending of public school teachers into parochial schools for courses in remedial reading and similar auxiliary services.[96]

The court in *P.O.A.U. v. Essex* failed entirely to address itself to the possibility of divisive religious partisanship arising from the program —a possibility to which the district court in *Wolman* and in *Kosydar* directed so much attention. It has been argued in criticism of this failure that the potential for political divisiveness arising from programs of aid to parochial schools has already been realized in subsequent appropriations and in the fact that funds originally appropriated for the invalidated tuition reimbursement plan were reappropriated to the tax-credit plan invalidated in *Kosydar*.[97] It might also be argued that this political activity finds its origin in court decisions and stems, not from the religious character of the beneficiary class, but from a determined attempt on the part of the legislature to provide constitutionally acceptable aid to parochial school children and to their families. Further, since the public funds are included in the annual total appropriations to the State Depart-

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[95] 28 Ohio St. 2d at 87, 275 N.E.2d at 607-08.

[96] Giannella, *supra* note 1, at 577.

[97] 41 CINN. L. REV. 694 (1972).

ment of Education for auxiliary services and materials to be provided to public and nonpublic school children alike,[98] an argument can be made that the political entanglement prohibition should present no obstacle to the program. Since services and materials provided to parochial school children may not exceed in cost or quality those provided public school children, any political debate would most likely relate to the need for and the merits of providing such services and materials to pupils in general rather than to those in nonpublic schools in particular.

Lemon purported to establish a clear Establishment Clause test by which to evaluate the constitutionality of state aid to parochial schools, yet it left the contours of that test undefined. As *Wolman*, *Kosydar* and *P.O.A.U. v. Essex* evidence, neither the tripartite nature of the test nor its political aspects were widely understood. Further, while the United States Supreme Court has never held that the first amendment prohibits all aid, the Establishment Clause test articulated in *Lemon* provided no clear guidelines by which state legislatives were able to fashion their own actions. As a result, state legislatures continued to search for means of providing constitutionally acceptable aid to parochial school education in order to alleviate the effects upon the public schools of the economic strain of parochial schools. In 1973, the United States Supreme Court once again attempted to define the limits of the first amendment.

V. *Nyquist*: Refinement of the Perspective

In May, 1972, the New York legislature enacted an elaborate scheme of financial aid to nonpublic school education.[99] Section One of the act provided for direct money grants to "qualifying"[100] nonpublic schools to be used for maintenance and repair of facilities. Section Two provided for tuition reimbursements to parents of nonpublic school children whose annual taxable income was less than $5,000. Reimbursement could not exceed fifty per cent of the actual tuition paid. Sections Three, Four, and

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[98] Ohio Rev. Code Ann. § 3317.06(A) and (D) (Page 1972) provides for distribution of payments to school districts for special programs including the cost of board and transportation required for physically or emotionally handicapped children attending regular or special classes and an amount for each school district with guidance, testing, and counseling programs. Ohio Rev. Code Ann. § 3318.17 (Page 1972) provides funds for the purchase and lease of additional classroom facilities, including laboratory apparatus, supplies, tools and other items of equipment for educational purposes. Am. Sub. H.B. No. 86.

[99] N.Y. Educ. Law, §§ 549-553 (McKinney Supp. 1973); N.Y. Educ. Law, §§ 559-563 (McKinney Supp. 1973); N.Y. Tax Law, §§ 612(c), 612(j) (McKinney Supp. 1973).

[100] *I.e.*, Serving a high concentration of pupils from low-income families for the purpose of Title IV of the Federal Higher Educ. Act of 1965, 20 U.S.C. § 425 (1970). Payments under Section One amounted to thirty dollars per pupil, or, if the facilities were more than twenty-five years old, forty dollars per pupil. In no event was the grant to exceed fifty per cent of equivalent per pupil cost in the public school systems.

Five authorized deduction of a stipulated sum for each child attending nonpublic schools from the adjusted gross income of parents whose annual taxable income exceeded $5,000, but was less than $25,000. The sum was unrelated to the actual amount of tuition paid, and decreased as the taxable income increased. The stated legislative purposes in instituting these programs included concern for the safety and welfare of the students attending nonpublic schools and a desire to make alternative systems of education a viable choice to lower income classes. These programs were almost immediately challenged. The district court found the first two programs unconstitutional, but upheld the validity of the tax relief program.[101]

In dealing with New York's statutory scheme, the Supreme Court in *Nyquist* focused on the primary effect criterion of the tripartite test and found that the statutes failed to meet it. Section One of the program, authorizing direct money grants to qualifying nonpublic schools, was an apparent legislative attempt to qualify under the "child benefit" theory articulated in *Everson* and *Allen*. While limiting the grants to maintenance and repairs, however, the legislation provided no mechanism assuring that the funds would not be used for such sectarian purposes as the renovation of classrooms in which religion would be taught. Indeed, the Court was of the opinion that it would be impossible to so restrict funds in a church-related school found by the Court to be unable to separate its religious teaching from its secular teaching. Thus, absent non-entangling restrictions, the grants constituted direct subsidy to religious activities, and such subsidies had as a primary and direct effect the advancement of the religious mission of the schools. Not mentioned, but certainly consistent with the Court's holding, was the possible adverse public reaction to an obvious transfer of state funds to a religious school.

In dealing with the tuition reimbursement program authorized by Section Two of the legislation, the Court remarked that if the money allocated for such reimbursement were granted directly to the school involved, as in Section One, such payments would clearly violate the Establishment Clause, for the state had placed no restrictions upon its use.[102] Recognizing the "conduit" effect articulated in *Wolman*,[103] the Court held that to make these payments to the parents made no constitutional difference, since the effect of the aid was to provide financial support to

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[101] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 350 F. Supp. 655 (S.D. N.Y. 1972).

[102] But, of course, had the state placed restrictions upon the use of the funds, the constitutionality of the statute would fail because of the entangling relationship between the school and the state arising therefrom.

[103] 342 F. Supp. at 416.

church-related schools. In attempting to distinguish tuition reimbursements to parents from the programs upheld in *Everson* and in *Allen*, the Court in *Nyquist* held that the school-parent distinction is only one among many factors to be considered and is not itself determinative of the question of constitutionality.[104] Rather, the Court said, *Everson* was grounded on the ideologically neutral character of the aid provided. Bus transportation, like police protection, can constitutionally be provided in common to all citizens. Likewise, statutes authorizing the loan of only secular textbooks, the aid provided in *Allen*, retain their neutral character.[105]

New York took the position in *Nyquist* that the tuition reimbursements were not violative of the Establishment Clause because there was no element of coercion involved in the possible uses to which the reimbursements could be applied. Consequently, the state argued, it would be mere speculation to suggest that the money would necessarily find its way to parochial schools.[106] The Court, in response, cited *Schempp* as holding that, while evidence of coercion might be pertinent to a claim under the Free Exercise Clause, it was not a necessary element of a claim under the Establishment Clause.[107] Rather the appropriate inquiry in an Establishment Clause claim is *whether a grant of public funds is offered as an incentive to parents to send their children to church-related schools whose sectarian and secular functions are inseparable.* If so, then the

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[104] 413 U.S. at 781.

[105] In Norwood v. Harrison, 413 U.S. 455 (1973), the Court held that the state of Mississippi could not constitutionally lend textbooks to students of private schools with racially discriminatory polices. In distinguishing textbooks from generalized services which government might provide to such schools in common with others, the Court noted that textbooks are a form of assistance readily available from sources entirely independent of the states—unlike the necessities of life. It must be noted, however, that state support is held to a much stricter standard when private discrimination is involved than in a situation where the internal tension within the Religion Clauses is involved.

[106] In Sloan v. Lemon, 413 U.S. 825 (1973), decided the same day as *Nyquist*, an attempt was made to distinguish Pennsylvania's tuition reimbursement program from that of New York. Argument was made before the Court that—unlike Pennsylvania's statutory scheme—New York's tuition grants were available only to parents in an extremely low income bracket. It would therefore be reasonable to predict that the grants would, in fact, be used to pay the tuition, thus making certain that the parents were conduits of public aid to religious schools. Since Pennsylvania required no such income limitation, it was argued, no assumption could be made as to how individual Pennsylvania parents would spend their reimbursements. The Court was not impressed with this distinction and held Pennsylvania's program unconstitutional as well.

[107] This represents a rejection of the "No Imposition" standard reconciling the Religion Clauses as articulated by Professor Alan Schwarz. His theory is that the Court has not dealt with the underlying value of the Religion Clauses, *i.e.*, protection from the historical fears of governmental imposition of religion upon unwilling citizens. Schwarz, *supra* note 11; Schwarz, *The Nonestablishment Principle: A Reply to Professor Giannella*, 81 HARV. L. REV. 1465 (1968).

"substantive impact" of the grant is to advance the religious function of those schools.[108]

A second argument proposed in support of the tuition reimbursements was based upon a statistical guarantee of neutrality. Reimbursement was limited to fifty per cent of the actual tuition paid. Since it is estimated that tuition covers only thirty per cent of the total costs of nonpublic education, the payments effectively provided only fifteen per cent of the overall educational costs of the nonpublic school. Since New York's education laws require that more than fifteen per cent of school time be devoted to teaching secular courses, the grants, even if paid totally to the parochial school, would not statistically have the effect of advancing religion. The Court, however, had adopted in *Lemon* the position that on the elementary and secondary levels neither teachers in the parochial schools nor the schools themselves are able to segregate their religious beliefs from their secular educational function. Thus the Court in *Nyquist* rejected statistical assurances of neutrality; such a standard, it was felt, would permit the state to become directly involved in the teaching of religion.[109]

The state's final argument was based upon the Free Exercise Clause. The reasoning under this argument has developed over the years and finds its roots in earlier holdings of the Court. *Pierce v. Society of Sisters*[110] recognized the right of parents to choose nonpublic education and recognized as well the validity of the state's requirement that certain secular subjects be taught. In *Sherbert v. Verner*,[111] the Court held that, absent compelling state interests, South Carolina could not consistently with the Free Exercise Clause withhold unemployment compensation benefits to a claimant who refused to work on Saturday when to do so would interfere with her observance of the Sabbath.

The Free Exercise argument in the context of public aid to parochial schools has two premises: first, the government requires children to attend school; and second, since there may be some sectarian parents who believe that a cult of secularism pervades public schools to such an extent that their religious convictions require that their children not be publically schooled,[112] state denial of aid to parents of those children would effectively deny them the choice of parochial school education recognized in

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[108] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973).

[109] *Id.* at 787.

[110] 268 U.S. 510 (1925). *See also* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[111] 374 U.S. 398 (1963).

[112] Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73 (1949).

Pierce.[113] While the Court in *Nyquist* recognized that affirmative state interference with a parents' right to have their children educated in a sectarian school would violate the Free Exercise Clause, neither the economic burdens of the parents of those children nor admirable social goals justify an "eroding of the limitations of the Establishment Clause now firmly emplanted."[114] Mr. Justice Powell's majority opinion put the Free Exercise argument to rest in holding that the clause places on government no affirmative duty to ensure that freedom of choice in religious matters be protected from factors distinct from government, such as inflation, rising costs of education and internal change in the structure of the religion. In *Norwood v. Harrison*,[115] the Court discussed in more detail the rejection of claims arising under both the Free Exercise and the Equal Protection Clauses:

> We do not see the issue in appellees' terms. In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.
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> The appellees intimate that the State *must* provide assistance to private schools equivalent to that it provides to public schools . . . . Clearly, the State need not. Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman* . . . . The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as

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[113] A variation of this line of reasoning, but brought under the Equal Protection Clause, goes as follows: United States v. Seeger, 380 U.S. 163 (1965), appeared to have broadened the definition of religion to include the philosophy of secular humanism. Thus, in effect, the system of public school education has already violated the Establishment Clause in promoting its own secular humanism or "irreligion." The first amendment should therefore be reinterpreted in light of this development, and the Court should recognize that neutrality can only be achieved by state provision of equal support to both public and parochial school systems. For a rejection of this argument see Jackson v. California, 460 F.2d 282 (9th Cir. 1972); Epeldi v. Engelking, 488 P.2d 860 (Idaho 1971). *But see* Honohan v. Holt, 17 Ohio Misc. 57, 244 N.E.2d 537 (Franklin Co. C.P. 1968); Hughes v. Board of Educ., 174 S.E.2d 711 (W. Va. 1970), *cert. denied*, 403 U.S. 944 (1971).

[114] 413 U.S. at 788-89.

[115] 413 U.S. 455 (1973).

to sectarian schools might best be achieved by withholding all state assistance.[116]

Mr. Chief Justice Burger, in his dissent to *Nyquist*, did not take issue with the majority finding that the Free Exercise Clause places no such duty upon the state. However, he perceived the basic principle running through the Establishment Clause cases to be that the clause has no *prohibitive* effect upon the state when legislation "moves away from direct aid to religious institutions and takes on the character of general aid to individual families."[117] The deciding factor for the majority, he felt, was not the form of the aid, but rather the religious nature of the possible beneficiaries and the percentage of persons choosing to use the money for religious purposes.[118]

Sections Three, Four, and Five of the New York scheme provided tax relief to parents whose adjusted gross income exceeded the limit for eligibility for tuition reimbursement but was less than $25,000. The amount of the deduction was unrelated to the amount of money actually expended by the parent, but was calculated according to a formula contained within the statute itself. In constructing the formula, the legislature attempted to ensure that each family would receive a carefully estimated net benefit (although not one equal to their total expenditures) and that the tax benefit would be comparable to the tuition grant for the lower income families.[119] The Court again refused to determine the constitutionality of the program on the basis of the form of the aid; instead it again looked to the substantive impact of that aid and saw no difference between the ultimate effect of the tax benefit allowed under Sections Three, Four, and Five and the tuition grant of Section Two.[120]

In support of its tax program, New York relied upon *Walz*. The Court, in response, distinguished *Walz* on two grounds: first, that of the historical *status quo* of the property tax exemption; and, second, the constitutional ground of government neutrality toward religion. Whereas property tax exemption had been accorded to religious organizations in all fifty states and congressional enactments exempting such organizations go back to at least 1802, the Court found no such historical basis for

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116 *Id.* at 462.

117 413 U.S. at 802.

118 "And the larger the class of recipients, the greater the pressure for accelerated increases." *Id.* at 797.

119 In his dissent, Mr. Justice Rehnquist saw New York's program as being analogous to the standard deduction in the INTERNAL REVENUE CODE which likewise has no relation to actual expenditures. The New York program, in his view, remained consistent with the concept of "benevolent neutrality" in its attempt to give lower income families greater freedom in exercising their religion. *Id.* at 810.

120 *Id.* at 790-91.

New York's—or any state's—innovative tax relief program for parents of parochial school children. As the district court stated, "[A] State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school."[121] The Supreme Court did not, however, reduce its determination in *Walz* or in *Nyquist* merely to an historical analysis. Recognizing that the power to tax has historically been seen as a tool of oppression, the Court in *Walz* felt that the principle of neutrality toward religion required that exemption of religious organizations from taxation be upheld as constitutional: "Thus, if taxation was regarded as a form of 'hostility' toward religion, 'exemption constitute[d] a reasonable and balanced attempt to guard against those dangers.' "[122] In short, the Court in *Nyquist* found attempted analogies to *Walz* unpersuasive. New York's statute providing tax deductions to parents of parochial school children was more properly analogized to the tuition reimbursement plan in substantive impact. Neither form, the Court held, was sufficiently restricted to assure that they would not have the impermissible effect of advancing religious schools.[123]

Because its holding was based upon the finding that New York's programs failed to meet the primary effect test, the majority made no specific finding with regard to the possibility of administrative entanglement between the schools and the state. It did, however, make certain that it was not abandoning the excessive entanglement test enunciated in *Lemon*. Reiterating the differentiation between the normal "political diversity expected in a democratic society" and "political division along religious lines [which] was one of the principal evils against which the First Amendment was intended to protect,"[124] the Court speculated that the maintenance and repair and the tuition reimbursement programs would require continuing annual appropriations. As for the tax deduction program, the majority felt that, while beginning at modest levels, demands for increases would undoubtedly ensue. All three programs, therefore, would necessarily entangle the political processes in relations

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[121] 350 F. Supp. at 669.

[122] 413 U.S. at 793. It seems, however, that this, too, is a "*status quo*" argument. Why is taxation of parochial school parents in support of public schools not seen as hostility if not because, historically, they have always been so taxed?

[123] *Id.* at 794. Mr. Justice Rehnquist, on the other hand, found it impossible to reconcile the majority's holding with *Walz*, where it was noted that abstention from taxation involved no transfer of revenue to churches. He saw the New York program as even further attenuated in that it provided for only a partial deduction, and tax benefit went not directly to churches or to their schools—which perform admittedly secular functions—but to parents, who are free to use it as they see fit. *Id.* at 807.

[124] *Id.* at 796 n.54.

with church-related institutions. The Court, wisely, was not prepared to make its nebulous concept of political entanglement by itself a determining factor in passing upon the constitutionality of state aid to parochial schools; yet it was not willing to abandon it: "And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored."[125]

Since *Lemon*, it is clear that the Court's treatment of governmental aid to parochial elementary and secondary schools is ultimately grounded upon its view of the nature of those schools. Because the Court finds the admittedly secular functions of parochial schools to be inextricably entwined with their sectarian functions, any aid flowing in whatever form to the educational operations of those schools will have the effect of advancing their religious mission. In *Nyquist*, the Court has shown how attenuated that aid may be and yet still have the *primary, i.e.*, unacceptable, effect of advancing religion. Unconstitutional aid need not pass directly to the schools, nor need it purport to subsidize wholly the operations of those schools. So long as the substantive impact of the aid is to assist the operations of the schools, it will be held to offend the Establishment Clause. "The problem, like many problems in constitutional law, is one of degree."[126]

VI. The Ramifications of *Nyquist*

In light of the trend that began with *Lemon* and continued in *Nyquist*, the future of public aid to parochial schools looks bleak indeed. The tripartite test has effectively produced a "Scylla-Charybdis" situation[127] in which proponents of public aid to private education can take little comfort. In his bitter dissent to *Nyquist*, Mr. Justice White makes clear that he not only sees no constitutional barrier to such aid, but also believes that failure to provide state aid may result in the ultimate demise of parochial school education:

> There is no doubt here that Pennsylvania and New York have sought in the challenged laws to keep their parochial schools system alive and capable of providing adequate secular education to substantial numbers of students. This purpose satisfies the Court, even though to rescue schools that would otherwise fail will inevitably enable those schools to continue whatever religious functions they perform. By the same token, it seems to me, preserving the secular functions of these schools is the

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[125] *Id.* at 798.

[126] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[127] Americans United for Separation of Church & State v. Oakey, 339 F. Supp. 545, 550 (D. Vt. 1972).

> overriding consequence of these laws and the resulting, but incidental, benefit to religion should not invalidate them.[128]

In theory, at least, some aid is constitutionally permissible:

> [W]here carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions, . . . not only because the States have a substantial interest in the quality of education being provided by private schools, . . . but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.[129]

Implicit in this statement is a formula by which both quantitative and qualitative limits may be placed upon parochial school funding by the states. The test is expressed in terms of degree: legislation must not have the *primary* effect of advancing religion, nor can it result in *excessive* entanglement. Thus, in applying the test, the Court looks not solely to the form of the aid—whether active or passive, as in grants as opposed to tax credits, or direct or indirect, as in aid to schools as opposed to parents—but also to the substantive impact of that aid upon the church-related school as well. The dilemma facing the Court in this area is a difficult one, illustrated by opposing positions taken in *Nyquist*. While Mr. Justice White in his dissent feared the possibility of the total collapse of the parochial schools, the majority feared the possibility that state action might assure their continued existence. The decision in that case indicates that the Court, at least for the present, will resolve this dilemma by seeking to prohibit the very aid that may make the difference between survival and extinction for those schools. The reason for this choice is that such aid would, to the public eye, amount to state sponsorship of religion by effectively incorporating the parochial schools into the public school systems without a change in their religious character.

The recent programs proposed by the various state legislatures are attempts—for secular purposes, to be sure—to keep the parochial school systems alive. Programs providing bus transportation to parochial school children are not sufficient, nor is the lending of textbooks to those children. Subsidies of teacher salaries, tuition reimbursements, and tax relief just may, however, keep those schools alive. The former are constitutional; the latter are not. The basic proposition which has emerged in the context of public aid to elementary and secondary sectarian schools is that any state aid which is necessary to their survival will amount to state sponsorship of their religious character. It is for this reason

[128] 413 U.S. at 823-24.

[129] Norwood v. Harrison, 413 U.S. 455, 468 (1973).

that the Court, through its tripartite Establishment Clause test, looks not to the mechanics of the governmental aid, but rather to the substantive impact of that aid upon the church-related institution. "[A] little aid is all right, but a lot is unconstitutional."[130]

The primary effect test will undoubtedly remain central to the concept of neutrality. However, so long as the Court articulates the entanglement test in terms of state administrative surveillance,[131] fiscal auditing, and fragmentation of the body politic, it will remain a meaningless, if not unmanageable concept, circling around but never reaching the heart of the Establishment Clause. Its recent emergence as an added dimension to the Establishment Clause test has resulted in seemingly irreconcilable case law.[132] Viewed from a public perspective, however, a common thread can be seen to run through the cases dealing with aid to parochial schools.

It should make no constitutional difference *per se* whether governmental authority must come into contact with a church-related college just once in order to effectuate its program, as the Court assumed in *Tilton*, or once a month to see that the parochial school is not constructing a chapel with state maintenance and repair funds. The real difference lies in what the Court perceives to be the substantially greater religious character of the sectarian elementary and secondary schools. Continuing and extensive interaction between the state and the school runs the risk of identifying the two in the public's eye. While *Everson* may be explained in terms of child welfare and family benefit, the Court in *Nyquist* did not adopt the Chief Justice's position that New York's tuition reimbursement plan was constitutional as a general welfare program. The difference between the two programs is that providing bus transportation has, from the public perspective, a minimal effect upon the operations of a church-related school, but tuition reimbursement may, from the same perspective, be seen as being substantially responsible for the continued operation of that school. It cannot be denied that such was the hoped-for result of New York's legislation. Likewise, the Court in *Walz* upheld property tax exemption for church property because to hold otherwise could only be read, from the public perspective, as a newly-developed hostility toward religion. To allow, however, substantial state funding

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[130] Haskell, *The Prospects for Public Aid to Parochial Schools*, 56 MINN. L. REV. 159, 181 (1971).

[131] It is readily admitted that the state is involved in surveillance of the parochial schools: "[S]ubstantially all non-public schools in Ohio have been inspected during the past school year to insure compliance with minimal educational standards established by the State Board of Education." Wolman v. Essex, 342 F. Supp. 399, 403 (S.D. Ohio 1972), *aff'd.*, 409 U.S. 808 (1972).

[132] See *supra* note 60.

of private education through tax relief programs after a long history without such funding could only be seen as affirmative sponsorship of parochial education. The Court's opinions should not be read to mean that teachers in elementary and secondary parochial schools cannot be trusted to keep religion out of their lectures. Rather, since from the public perspective they participate in an operation inherently religious, their position and functions cannot be separated from the atmosphere in which they teach. For the state to participate in that educational process in a substantial manner, as through salary supplements or through tuition reimbursements, is to identify the state with that inherently religious operation. Further, to require parochial schools to omit the element of religion from their educational functions would be to require that they compromise their religious character.

State legislatures and parochial schools still must grapple with the serious problems confronting those schools. To date, every attempt to provide substantial aid aimed at alleviating their problems and facilitating their continued operations has been invalidated. In its recent treatment of aid to parochial schools, however, the Supreme Court has dealt directly only with attempts by state legislatures to provide either aid intimately serving the overall functions of the parochial schools, such as teacher salary supplements and general economic aid to parents of parochial school children, or aid granted directly to the schools involved, such as New York's maintenance and repair grants. Although the options open to the states have been severely curtailed, it is unlikely that attempts to aid parochial schools and their students will cease altogether.

In dealing with such attempts, it must be remembered that the three prongs of the tripartite test do not constitute ends in themselves; they have been constructed to effectuate what the Court perceives to be the heart of the Establishment Clause, *i.e.*, protection against sponsorship by and active involvement of the state in religious activities. Mechanical application of the test could result in the invalidation of aid which does not offend this value. To lose sight of the tension within the first amendment unnecessarily runs the risk, not of identifying the state with the religious activity, but of expressing a hostility towards participants in parochial school education.

VII. Ohio's Auxiliary Services and Materials Program: Application of the Perspective

The Ohio General Assembly on August 15, 1973, allocated a supplemental appropriation[133] to the program[134] providing auxiliary services and

[133] H.B. 993, 110th Gen'l. Assembly (1973).

materials to nonpublic education upheld by the Ohio supreme court in *P.O.A.U. v. Essex*. The additional moneys, providing over $81 million over the next two years, were the same funds previously appropriated to the tuition reimbursement and tax credit programs invalidated in *Wolman* and *Kosydar*. A challenge to this supplemental appropriation and to the original program has been filed in the same district court which held invalid Ohio's previous attempts to aid parochial school education.[135]

The auxiliary nature of the services authorized by the program is crucial to the question of constitutionality. The majority in *Nyquist* rejected the argument that tuition reimbursement and tax credits provided to lower income families were mere social welfare programs, since the funds involved could effectively be channelled into the general operational funds of the parochial schools. However, services in the areas of guidance, testing, and counseling programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children in nonpublic schools do not form an intimate part of the basic curriculum and educational operations of such schools. Speech therapy addressed to a particular child is not a vehicle for religious indoctrination. Nor is remedial reading instruction (so long as the materials used remain secular) primarily an aspect of a child's spiritual development. These programs are, rather, therapeutic services directed toward alleviating a particular child's handicaps. Although guidance, testing and counseling programs would not exist in isolation with respect to a child's education, there is a qualitative difference between state support of a core curriculum and state provision of auxiliary services. Unlike the presentation of a basic educational curriculum in an atmosphere of Christian thought, programs addressed primarily to a particular child's physical health and welfare do not form the underlying goal of parochial school education. Thus the nature of the services provided under the program could be characterized as primarily neutral, with only that degree of advancement of, and entanglement with, religion that was present in *Everson* and *Allen*.

Both *Everson* and *Allen*, however, may be distinguished on the ground that the statutes upheld in those cases provided for aid to be granted to students in public and nonpublic schools alike. Ohio's statutory program, on the other hand, is directed to a class primarily limited to members of one sect.[136] The district court in *Kosydar* was of the opinion that such a statute, conferring even secular and non-ideological

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[134] OHIO REV. CODE ANN. § 3317.062 (Page 1972). For text see *supra* note 86.

[135] Wolman v. Essex, Civil Action No. 73-292 (S.D. Ohio, filed July 26, 1973).

[136] Although, it must be remembered, other statutes authorize provision of similar services and materials to public schools and to their pupils. OHIO REV. CODE ANN. § 3317.06 (A), (D) (Page 1972); OHIO REV. CODE ANN. § 3318.17 (Page 1972). *Supra* note 98.

aid, will, as a matter of law, have the primary effect of advancing religion.[137] The ramifications of such an opinion are unclear, however, for the court went on to hold that a statute found to have such an effect will be upheld against constitutional challenge if the state can demonstrate by clear and convincing evidence that the entanglement objections which customarily attach to such a law will be avoided.[138] Although this program does not present another *Walz* situation, it can safely be said that seven years of operation have not to date resulted in a state-established religion or system of religious education.

A more questionable ground of objection to a limited class of beneficiaries was presented in *Klinger v. Howlett*[139] where the Illinois supreme court held unconstitutional legislation[140] appropriating $20 million to provide textbooks and auxiliary services[141] to parents of nonpublic school children. Like the Ohio program, the Illinois funds were to be paid to the local school districts. In a surprising opinion, the Illinois court found that the legislation had created a state subsidy which was unavailable to other sectors of the population. Where the cost of these services to public school students is borne by the taxpayer of the local school district, the cost of the same services to nonpublic students is borne by the taxpayer of the state. As a result, parents of nonpublic students received an economic benefit to the exclusion of other parents. The majority failed to reveal how such objection related to the Establishment Clause test, and, as the dissent pointed out, if an equal protection objection does indeed exist, it would not find its basis in the Establishment Clause. The Illinois court unfortunately relied upon recent United States Supreme Court decisions without distinguishing the qualitative nature of the programs involved. *Sloan v. Lemon*[142] invalidated a tuition subsidy as an incentive to parents to send their children to sectarian schools; *Levitt v. Committee for Public Education & Religious Liberty*[143] invalidated a statute providing reimbursement to nonpublic schools for the cost of administering tests. The Court found that the overwhelming majority

137 Kosydar v. Wolman, 353 F. Supp. 744, 762 n.22.

138 *Id.* at 762.

139 305 N.E.2d 129 (1973).

140 122 ILL. REV. STAT. ANN. § 1022 (Supp. 1972).

141 The court perceived two types of services authorized by the legislation: (1) school health services, consisting of services by physicians, surgeons, nurses, dentists and podiatrists; and (2) guidance and counseling services, remedial reading, and therapeutic programs. The court saw the first category as purely secular, but saw the second as not susceptible of supervision to assure secular content. It appears from the dissent, however, that the majority did not consider that these latter services would be furnished and controlled by the local school district and would thus be free of the influence of the nonpublic school.

142 413 U.S. 825 (1973).

143 413 U.S. 472 (1973).

of tests involved were those drafted by the nonpublic teacher and administered as part of the basic core curriculum. *Sloan* itself distinguished forms of aid conferring similar secular benefits to all families from aid resulting in sponsorship of the religious school.[144] The Illinois court in *Klinger* lost sight of the value underlying the decisions of the United States Supreme Court. If medical services to nonpublic school students —admitted by the Illinois court to be secular and free of entangling ramifications—offends the Establishment Clause, it is difficult if not impossible to conceive of valid state aid which the United States Supreme Court insists theoretically exists.[145]

An entanglement problem arises in the Ohio auxiliary services program because public school personnel will be sent into the parochial schools. *McCollum v. Board of Education*[146] held unconstitutional a program permitting parochial school personnel to enter public school buildings to conduct religion courses. *Americans United for Separation of Church and State v. Oakey*[147] applied the principle of *McCollum* and held unconstitutional Vermont statutes appropriating to the local school districts funds with which to hire teachers of secular subjects in nonpublic schools.[148] The court in that case found inadequate the fact that the teachers would be under contract to the school district; indeed, that fact only served to exacerbate the entangling confrontation between the school and the state, for, the court surmised, there would develop within the nonpublic school a segment of personnel whose loyalties would run contrary to the school's administration.[149] Further, because the program provided the school districts with the power to determine the educational needs of the parochial school students, secular authorities would perforce become intimately involved with the shaping of the policies of that school, thus compromising the integrity of both the school and the state. The *Oakey* court took note, too, of the atmosphere of religion which would pervade even the physical plant of the school and objected to the subtle effect that such surroundings may have on the state-hired teach-

144 *Id.* at 832.

145 The United States Supreme Court has stated that a legislature could rationally withhold secular health care and textbooks from nonpublic students on the ground that neutrality might best be achieved in this manner. Norwood v. Harrison, 413 U.S. 455, 462 (1973). This determination is a matter of *legislative policy*, however, and not for the court.

146 333 U.S. 203 (1948).

147 339 F. Supp. 545 (D. Vt. 1972). *See also* Americans United for Separation of Church & State v. Paire, 348 F. Supp. 506 (D. N.H. 1972).

148 16 V.S.A §§ 3441, 3445, 3471(3), (4) (Supp. 1973).

149 The court, however, also found a possibility of an impermissible fostering of religion, because: "Once within the church school . . . the instruction would become subject to pressures which the Court has warned us would make religious neutrality extremely difficult." 339 F. Supp. at 553.

ers. A more persuasive argument would be that, from a public perspective, the public school system had become physically identified with the religious nature of the educational operations in the parochial school. Yet these programs are not precisely analogous to the Ohio program because of the auxiliary nature of the services provided under the latter. Whereas in *McCollum* and in *Oakey* the states had become physically identified with the teaching of religion, under the Ohio program the state enters the parochial school for an entirely different purpose. Administration of therapeutic services within the parochial school is not entwined with that school's religious function except insofar as the building exists. The state's substantial involvement in such services does not run the risk of identification of the state with the religious character of the school, just as the state does not become identified through the inspections which must be made in order to grant charters and accreditation to those schools. Further, it cannot be denied that, as a practical matter, nonpublic school children can benefit from these public welfare services only if the programs physically reach the schools which they are now attending.

In *Tilton*, the Court did not find objectionable the expenditure of federal funds to construct a building forming an integral part of the physical structure of a church-sponsored school. The basis of that decision was that government funds would not become involved in the religious mission of the institution since the Court had found that the sectarian and secular functions of schools at the higher levels of education were separable even as to the basic educational curriculum. On the other hand, the Court has found the purpose of parochial school education at the lower levels to be the molding of the child's religious development through the basic educational curriculum. Following this reasoning, therefore, while state aid in areas of the parochial school's basic curriculum would necessarily involve the state in the religious function of that school, there should be no constitutional objection to state aid in areas where the state does not intrude upon that function.

In addition to auxiliary services, the Ohio program authorizes the loan of secular materials to nonpublic schools. Because such aid is granted directly to the schools for use in the curriculum, it has much less constitutional support and may prove fatal to the auxiliary services program.[150] In upholding this provision, the Ohio supreme court in

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[150] The court in *Wolman* struck down the parental reimbursement program despite the fact that the grants covered the cost not only of tuition but of transportation and textbooks as well:

> However, this Court is not able to sever those aspects of parental reimbursement grants which may be constitutionally permissible (textbooks, transportation) from

P.O.A.U. v. Essex found the preliminary determination of the appropriateness of the materials was sufficient to ensure their secular use. In its analysis, however, the court failed to consider the continuing surveillance problems inherent in the use of such materials in the parochial schools. While no court would presume that parochial school personnel, having agreed not to use such materials in religious instruction, would fail to abide by that agreement, one could point to the possibility of unconscious injection of religion (either through the teacher or through the surrounding physical atmosphere of the church-related school) while using the state-provided materials. Yet the even greater possibility of such entanglement was apparently acceptable in *Allen*, in which a statute authorizing the loan of textbooks—which constituted the heart of the core curriculum—was upheld. One possible ground for distinguishing *Allen* (other than the fact that the statute in that case was directed to all students) is the fact that, in that case, the materials were lent to the students rather than to the schools, as the Ohio program provides. Yet, whether lent to schools or to children, the effect of the statute remains the same, and, as the Court held in *Nyquist*, such a distinction is not itself determinative of the question of constitutionality.

It is uncontroverted that the moneys appropriated in August may be characterized as "vast and unprecedented,"[151] and an interesting question arises whether or not the supplementary appropriation changes the character of the program. Prior to the supplementary appropriation, the public school districts had available to them roughly twelve dollars per nonpublic school child, an amount insufficient to cover even one-tenth of the cost of providing only a remedial reading teacher hired by the school district to provide services to nonpublic school children. In practice, therefore, services authorized by the program where "available only to the largest of schools where the per-pupil funding was insufficient to offset the cost of specialists hired by the public school districts."[152] The supplementary allocation would raise the funding to $150 per pupil.

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those which are clearly unconstitutional (tuition). . . . First, neither the statute nor its guidelines impose enforceable standards for the apportionment of these funds among the various allowed purposes. Therefore, individual schools have almost complete discretion as to how such grants may be allocated. Second, it is not entirely clear that even those funds which are allocated for the purchase of secular textbooks or transportation are constitutionally valid. . . . Since Section 3317.062 supplies even this secular and non-ideological aid because of the recipients' religious status and affiliation, it may be invalid. We intimate no opinion as to the constitutionality of the non-tuition aspects of the Ohio scheme if they were made to conform, in terms of breadth of class, to the statutes upheld in *Everson* and *Allen*.

342 F. Supp. at 419 n.27.

[151] Complaint at 7.

[152] Memorandum of Intervening Defendants *contra* Motion for Temporary Relief at 2, 3.

The only difference between the program as originally funded and as presently funded is its possible effectiveness. The appropriation, providing $40 million per year for the next two years, may arguably be seen as a legislative attempt to provide aid in an amount sufficient to assure the continuation of the nonpublic schools. Yet, if the qualitative nature of the auxiliary aid is such that it cannot assure such continuation, the quantitative nature of the aid should not be determinative.[153] Since the provision of auxiliary educational materials does not alleviate the problem which may be the most pressing—the salaries of teachers of the basic curriculum courses—it is unlikely that the program will ultimately be determinative of the continued financial viability of those schools. Further, the services provided to the students will not substantially free parochial school money for use in their religious functions, for few, if any, parochial schools presently provide these services out of their own funds.[154] The primary beneficiaries of the program will be the children who are in need of such services and who are not presently receiving them.

One should hesitate to place excessive reliance upon *Allen* in arguing the validity of the statute, for the court has indicated that its holding in that case may be quite narrow:

> Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill" thrust easily set in motion yet difficult to retard or stop.[155]

Many objections to this program may be raised. But the test, it will be recalled, is articulated in terms of degree. Mechanical application of that test may fail to serve the value it is meant to protect. A court must look to the substantive impact of the program upon the school; if its intended consequence is to preserve and to sponsor the church-related school, then its effect is to identify the state with the religious activities of that school. If, on the other hand, the program can reasonably be seen primarily as a design to ensure the general health and welfare of children who happen to attend nonpublic schools, then a court should not deny them those benefits simply because their parents have chosen to freely exercise their religious beliefs.

Norah C. McCann

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[153] The guidelines for the implementation of the program provide that funds unencumbered and unexpended at the close of the second year of the biennium shall be returned to the State Treasurer.

[154] Memorandum of Intervening Defendants *contra* Motion for Temporary Relief at 5.

[155] Lemon v. Kurtzman, 403 U.S. 602, 624 (1971).